

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1796

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

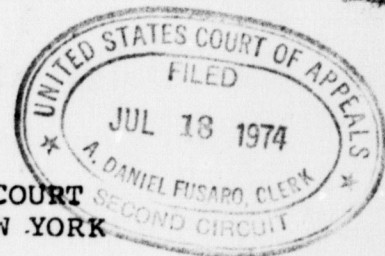
GEORGE THOMAS,

Appellant.

Docket No. 74-1796

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA,
Appellee,
-against-
GEORGE THOMAS
Appellant.

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Whether the Government failed to prove beyond a reasonable doubt that appellant lacked authorization to sign the payee's name to the check.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (the Honorable Frederick van Pelt Bryan) rendered on April 30, 1974, after a trial without a jury convicting George Thomas of forging and uttering a United States Treasury check, in violation of 18 U.S.C. §495.

Imposition of sentence was suspended and appellant was placed on probation for two years on the forgery count; imposition of sentence was suspended on the uttering count.

The Legal Aid Society Federal Defender Services Unit was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged with forging and uttering a United States Treasury check for \$98.60 payable to Rosario Bucci. The Government alleged that in April 1972 appellant signed Bucci's name to the check, signed his own name below Bucci's, and cashed the check at his savings bank. Appellant maintained

that he did not forge Bucci's signature and that he won the check from an unidentified man at a dice game.*

The Government sought to prove its case primarily by the testimony of Mrs. Gloria Sandmeyer, Bucci's daughter, and John Hargett, a documents examiner.

Sandmeyer related that Bucci died in July 1972, that in April 1972 he was 79 years of age, somewhat infirm, and left home rarely. She stated that Bucci lived alone, that she saw him twice per month, and that, to the best of her knowledge, he didn't play dice (22-26).

Hargett, a documents examiner for the United States Secret Service, testified that appellant forged Bucci's signature (34-49).**

Appellant offered no evidence.

Following the close of the government's case defense counsel argued for acquittal on the ground that the Government had failed to prove beyond a reasonable doubt that appellant lacked authorization to sign Bucci's name. He argued that nothing

*Appellant made these statements at a post-arrest interview (30-31). Appellant did not testify at trial.

Numerals in parenthesis refer to pages of the trial transcript.

**Other government witnesses were Richard Walker, manager, People's Bank for Savings of New Rochelle, Heathcote Branch, who related that appellant, a regular bank customer, cashed the check there (7-19), and Agent William Lometti, United States Secret Service, who related appellant's post-arrest statements (26-33).

in the government's case refuted appellant's plausible contention that appellant won the check playing dice.

After hearing argument, Judge Bryan found appellant guilty on both counts.

ARGUMENT

THE GOVERNMENT FAILED TO PROVE BEYOND
A REASONABLE DOUBT THAT APPELLANT
LACKED AUTHORIZATION TO SIGN THE
PAYEE'S NAME TO THE CHECK.

The Government established that appellant signed the payee's name to the check, signed his own name below that of the payee, and then negotiated the check for cash at his savings bank. Appellant, in a post-arrest statement, claimed he won the check in a dice game. Thus, the only issue at trial was whether the Government could prove beyond a reasonable doubt that appellant lacked authorization to sign the payee's name.*

*Assistant United States Attorney Glekel recognized the necessity of proving lack of authorization:

[Mr. Glekel]: One of the elements we have to prove is that there was no authorization to sign the endorsement... (24).

Since the payee, Bucci, died shortly after appellant cashed the check, the Government had to rely on circumstantial evidence to refute appellant's assertion that he won the check from an unknown individual at a dice game. The Government sought to adduce this proof by the testimony of the payee's daughter, Mrs. Sandmeyer, and by appellant's false exculpatory statement that he didn't sign Bucci's name.

The Government attempted to have Sandmeyer testify to the facts that they wished Bucci would have related - that Bucci didn't know appellant, play dice, or for any reason authorize appellant to sign the check. Sandmeyer, however, was incapable of giving this evidence. She related that in April 1972 Bucci was elderly, somewhat infirm, and didn't play dice.* She admitted, though, that Bucci lived alone and that she saw him only twice a month.

Thus, Sandmeyer lacked knowledge of Bucci's whereabouts for the great majority of time. Certainly, if Bucci played dice to pass away his idle hours he would not tell his daughter. Sandmeyer's evidence, therefore, was completely in-

*Sandmeyer also testified, over strenuous objections of defense counsel, that Bucci had never mentioned appellant's name. The Judge allowed the evidence, but apparently agreed with defense counsel that this "negative proof" (24:2) was entitled to little if any weight (24:25-25:2). This testimony was also of no importance because appellant did not claim to have known Bucci, other than as an anonymous face at a dice game.

adequate to prove that Bucci didn't on one occasion in April 1972 lose at dice to appellant.

The Government also sought to infer lack of authorization by refuting appellant's post-arrest denial that he forged Bucci's signature. Appellant's false exculpatory statement, however, does not contradict his fundamental assertion that he won the check playing dice.*

Based only upon Sandmeyer's testimony and appellant's false exculpatory statement a reasonable person could not fairly conclude beyond a reasonable doubt that appellant lacked authorization to sign Bucci's name. United States v. Taylor, 464 F.2d 240, 242-45 (2d Cir. 1972). Appellant's assertion that he won the check at a dice game was a credible explanation for possession of the check, which the government's evidence was totally unable to refute. Cf. United States v. Frank, 494 F.2d 145, 153 (2d Cir. 1974). These facts fall far short of the circumstantial evidence in United States v. Brown, 236 F.2d 403 (2d Cir. 1956). There, as here, the payee of the check had

*That appellant could have won the check playing dice was acknowledged by the Judge:

THE COURT: Have you ever been in a crap game?

MR. GLEKEL: I take the Fifth Amendment on that.

THE COURT: I will say I have been in a

died prior to the trial, but the Government was able to introduce two strong items of circumstantial evidence to prove want of authorization: Brown not only signed the payee's name, but represented himself as the payee when he tried to cash the check at a supermarket; Brown, when asked to give handwriting samples, attempted to disguise his writing. According to this Court only these factors sustained a finding of no authorization. Ibid, at 406. See also Ryno v. United States, 232 F.2d 581 (9th Cir. 1956); United States v. Prussian, 42 F.2d 854 (2d Cir. 1930); Berg v. State, 157 Neb. 863, 61 N.W.2d 837 (1954).

The circumstantial evidence in this case, unlike in Brown, was so weak that a conviction should not have been had.

crap game, not for a great many years,
but when you are in a crap game it doesn't seem to me likely you will go around
identifying a lot of people. (59)

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and a new trial ordered.

Respectfully submitted,

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